A Little-known Case from the American Civil War

The War Crimes Trial of Major General John H. Gee

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Abstract

Major John Henry Gee was the commandant of the Confederate prison at Salisbury, North Carolina from 1864 until 1865. During his tenure, thousands of Union prisoners of war died of starvation and diseases or were shot when attempting to escape. Shortly after the end of hostilities, Major Gee was arrested, charged with two counts of violations of the laws of war and brought before a military commission to be tried. The trial of Major Gee is one of the first recorded trials for war crimes and a rare early example of domestic prosecution of an enemy fellow-national for what was effectively an international crime, in a war in which his side had been vanquished. Unlike the war crimes trial of Henry Wirz, commandant of Andersonville prison during the American Civil War, little attention has been paid to this important precedent.

1. Introduction

The life of John Henry Gee was remarkable. Born in Quincy, Florida, into the relative comfort of a land-owning family, he received his MD degree at the age of 21 years from the Medical College of South Carolina. Gee went on to serve as a military physician in both the Seminole and the Mexican wars before volunteering to serve as military aide to Florida secessionist Governor Madison Stark Perry. Promoted rapidly in the Confederate army, he became Captain and then Major. On 24 August 1864, Gee was ordered to take command of the Salisbury Confederate prison where hundreds of Union prisoners of war were being detained.[1]

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1 Bibliographical details are taken from A. Gee Ford (ed.), *The Captive – Major John H. Gee, Commandant of the Confederate Prison at Salisbury, North Carolina, 1864–1865, A Bibliographical Sketch with Complete Court-Martial Transcript* (Salt Lake City: Utah Bookbinding Co., 2000)

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Sanitary conditions at Salisbury prison were deplorable. Diseases were rampant, food insufficient and the water unclean or infected. Prison facilities were grossly inadequate for the increasing number of inmates the prison was being asked to accommodate, particularly after the breakdown of the prisoners' exchange scheme between the two warring sides. As a result of these conditions, thousands of Union prisoners died of malnutrition and diseases. Others were killed as they tried to escape.[2]

At the end of the hostilities, having been paroled, Gee returned to his home and family in Florida. He stayed there until he was detained, sometime in October 1865, on charges of war crimes. He was initially brought and imprisoned in the Old Capital Prison in Washington before being transferred to Raleigh, North Carolina, where he would be tried.

The charges against Gee consisted of two counts of violations of the laws and customs of war. The first pertained to the general conditions in the Salisbury prison, including the cruel and inhuman treatment of detainees, while the second charge was for the murder of a number of detainees, including those who had been killed as they attempted to escape.[3] The proceedings took place before a military commission convened by virtue of 'Special Orders No 35' (8 February 1866).[4]

2. Preliminary Challenges to the Jurisdiction of the Military Commission

The trial of Major Gee opened on 21 February 1866. The accused was brought before the commission on that day and asked if he had any objection to any member of the commission, to which he replied that he had no such objection. After recording some concerns with the lack of specificity of the charges and the limited amount of time given to him to prepare, Gee's counsel proceeded to challenge the jurisdiction of the military commission. According to his counsel, Gee was the beneficiary of the terms of surrender of Confederate troops to which he had belonged, and which provided, he said, for the complete

(hereinafter, '*The Captive*'). This publication contains the verbatim record (and documents) pertaining to the proceedings against Major Gee. Little else has been written about this case. A footnote reference to the trial may be found in W. Winthrop, *Military Law and Precedents* (2nd rev. and enlarged edn., Washington: Government Printing Office, 1920), at 792, footnote 18.

2 For a historical account of Confederate (and Salisbury) prisons during the US Civil War, see e.g. C. Sanders, *While in the Hands of the Enemy: Military Prisons of the Civil War* (Baton Rouge: Louisiana State University Press, 2005); L. Brown, *Salisbury Prison: A Case Study of Confederate Military Prisons (1861–1865)* (Wilmington, NC: Broadfoot, 1990).

3 The charges were each particularized by so-called 'specifications' that detailed the nature and cause of the charges brought against the accused.

4 The Special Order provided that 'A military commission is hereby appointed to meet at Raleigh, N.C. on the 19th day of February 1866, or as soon thereafter as practicable, for the trial of such prisoners as may be brought before it.' The order then listed the members of the Commission. It was issued by Major General Thomas H. Ruger, commander of the Department of North Carolina.

paroling of crimes committed during the conflict.[5] On this basis and by the authority enjoyed by military commanders under the laws of war to agree to such terms, counsel asked the commission to decline to exercise its jurisdiction over Gee's alleged offences.[6]

The Judge Advocate responded to Gee's challenge a day later. He took no issue with the facts put forward by Gee — notably, the existence of the terms of surrender applying to forces to which Gee had belonged and the fact that according to these terms members of those forces were permitted to return to their homes, terms which Gee had respected. However, he took direct issue with the legal effect of those terms. According to the Judge Advocate, the terms of surrender did not apply to conducts carried out in violation of the laws and customs of war and were therefore of no benefit to an accused such as Major Gee who had been charged with violating those laws and customs.[7] The Judge

5 The submissions of Gee's counsel on that point are re-printed in *The Captive* at 14–15. See, in particular, the following: 'In bar of his trial by the said [Military] Commission the said John H. Gee respectfully represents that at the time of the surrender of the Armies of the So-called Confederate States, he held the commission of Major therein, that after said surrender to wit 1st day of May A.D. 1865, he was regularly and duly paroled by the military authorities of the United States, and relying upon said parole and in pursuance of the express terms thereof he returned to his home at Quincy, in the State of Florida.… [I]n consequence of his parole aforesaid and of the express terms of his surrender and of his conduct under said parole he was and is rightfully protected from arrest disturbance or trial by the U.S. Military Authorities, the faith of the United States being pledged thereto.' (*Ibid.*, at 14.) In support of his argument, counsel for Gee also sought to rely upon an advice given by the Attorney General to the President of the United States in relation to the possible prosecution of the leaders of the Confederacy. Gee cited the following portions of that advice: 'He says some prominent rebels were personally present at the invasion of Maryland and Pennsylvania, but all or nearly all of them received Military Paroles upon the surrender of the rebel armies. Whilst I think that these paroles are not ultimate protection from proceedings for High Treason, I have thought that it would be a violation of the paroles to prosecute those persons for crimes before the political power of the Government has proclaimed that the rebellion has been suppressed' (*ibid.*, at 14).

6 See *The Captive*, at 15 ('Wherefore, the said John H. Gee respectfully requests that this Court will decline to exercise jurisdiction in his case and will regard his statement aforesaid, and his parole annexed as a bar to his trial, or that if any doubt exists whether said parole is a full protection, that the matter be referred to the proper authorities at Washington, as he is informed and believes that the Lieutenant General Commanding the armies of the United States and other of the high officers thereof regard paroled prisoners of war as protected by their paroles from trial or molestation, and for further reason he says that by the Laws of Nations it is held as a part of the fundamental Law of Nations and of War "that as every Commander necessarily has a power of agreeing to the conditions on which the enemy admits his surrender, the engagements entered into by him for saving his life or his liberty, with that of his men, are valid as made within the limits of his powers, and his sovereign cannot annul them",: See, Vettils Law of Nations Book III, Chapter VIII. Section 151.' (Footnote omitted.)

7 The arguments of the Judge Advocate are re-printed in *The Captive*, at 19 and 20. Note, in particular, the following submissions: 'These facts as stated by the defence are admitted by the Prosecution, saving and excepting, the fact as claimed that the terms of the said convention [of surrender] insured protection to any officer, or man surrendered for any acts beyond those committed in fighting the battles of the rebellion in strict conformity with the laws and customs of war. … [A]nd that therefore, the faith and honor of the Government by this convention is only pledged not to disturb officer or man entitled to the benefit of its terms for any act of hostility or war properly waged, and that the terms of said convention offer no further

Advocate concluded that the parole which resulted from the terms of surrender could not and did not apply to the offences that formed the basis of the charges against Gee.

After hearing the submissions of the Judge Advocate, the commission cleared briefly for deliberations. When it returned, the Judge Advocate announced the commission's decision in those terms:

> The Commission denies the plea in bar of the prisoner, - for the reasons following to wit:
> 1st That according to the laws and customs of war, and the rules laid down for the government of the Armies of the United States in the field, a prisoner of war is not protected from the punishment of crimes committed in violation of the laws and customs of war, (committed before he was captured) and for which he has not already been punished by his own authorities.
> 2nd That the terms of the convention for the capitulation of the insurgent forces as set forth in the said plea, of the said prisoner, and the parole of the said prisoner under the same, are not to be construed as affecting the status of the said prisoner, as a prisoner of war answerable to the law as before set forth.[8]

The exact reasoning adopted by the commission in its decision is not entirely clear. It could be read as an endorsement of the Judge Advocate's argument that the terms of surrenders could not provide, as a matter of international and domestic law, for the pardoning of a violation of the laws and customs of war. Read in that way, the commission's ruling would provide some authority for those who suggest that, as a matter of international law, international crimes may not be subject to any sort of pardon or amnesty. That position would also find some support in the legal submissions of the Judge Advocate in the earlier trial of Henry Wirz who had been tried for war crimes committed in Andersonville prison during the US Civil War.[9] The decision of the

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protection, and that therefore the prisoner stands in the matter of these charges of offences in violation of the laws of war entirely beyond any protection he could demand as an honorable soldier.' (at 19) At most, the Judge Advocate considered that proceeding with the charges despite the parole would raise a 'point of honor' for the government, but not one of law (*ibid.* at 20). The Judge Advocate also pointed out that a similar challenge had been rejected by the military commission that tried Henry Wirz, the Confederate Commander of Andersonville prison (*ibid.*). The record of the proceedings against Henry Wirz may be found in House Executive Documents, Vol. 8, No. 23, No. 1381, 40th Cong. 2nd Sess. (1868).

8 *The Captive*, at 21.

9 During those proceedings, Judge Advocate, Colonel Chipman, had made the following submission: 'In the forum of nations there is a higher law – a law paramount to any rule of action prescribed by either of them, and which cannot be abrogated or nullified by either. Whatever the peculiar forms or rights of this or that government, its subjects require no control or power other than is sanctioned by the great tribunal of nations. We turn, then, to the code international, where the purest morals, the highest sense of justice, the most exalted principles of ethics, are the cornerstones, that we may learn to be guided in our duty to this prisoner [Wirz].' See L. Friedman, *The Law of War – A Documentary History*, Vol. I (New York: Random House, 1972) 783, at 794. Literature on the trial of Henry Wirz include the following: L. Laska and J. Smith, 'Hell and the Devil: Andersonville and the Trial of Henri Wirz, C.S.A., 1865', 68 *Military Law Review* (1975) 77 (in particular, at 110–111); R. Morsberger and K. Morsberger, 'After Andersonville: The First War Crimes Trial', 13 *Civil War Times Illustrated* (1974) 30; and D.B. Rutman, 'The War Crimes and Trial of Henri Wirz', 6 *Civil War History* (1960) 117;

commission could, however, be construed more narrowly as suggesting that it was by reason of the scope of the terms of surrender themselves, rather than as a consequence of an international prohibition against such pardons, that the alleged crimes of Major Gee could not come within the terms of the amnesty. Whichever interpretation is adopted of the commission's ruling, the submissions of the Judge Advocate provide, at the very least, some authority for the proposition that, as early as 1866, international law might have been moving against the immunization of international crimes.

Gee's initial jurisdictional challenge having failed, his counsel immediately presented another one. This challenge was based on the proclamation of Pardon and Amnesty issued by US President Andrew Johnson on 29 May 1865.[10] According to Gee, the President's proclamation granted full amnesty and pardon to persons engaged in rebellion against the United States on certain conditions and upon taking a certain oath, which Gee had duly taken during the course of that year.[11]

The Judge Advocate responded that the commission should dismiss this new jurisdictional challenge for three reasons: first, because the applicant had failed to make that claim as part of his initial jurisdictional challenge; second, because the President's proclamation had explicitly excluded from its scope those 'who engaged in any way in the treating otherwise than lawfully as prisoners of war persons found in the United States service, as officers, soldiers, seamen or in other capacities';[12] and, third, because without a presidential pardon, persons alleged to have committed such crimes could not escape justice by the mere taking of an oath.[13] After a short recess, the

G. Mettraux, 'Wirz', in A. Cassese et al. (eds), *Oxford Companion to International Criminal Justice* (Oxford: Oxford University Press, 2009); N.P. Chipman, *The Tragedy of Andersonville: Trial of Captain Henry Wirz, the Prison Keeper* (San Francisco: Bancroft, 1911).

10 See The Library of Congress for the digital file of the proclamation at: http://memory.loc.gov/cgi-bin/query/h?ammem/rbpebib:@field(NUMBER+@band(rbpe+23502500 (visited 5 August 2010).

11 See, generally, *The Captive*, 21–22 ('John H. Gee says that he was and is included in said proclamation and that he is not and has not been excluded from availing himself of the benefits thereof and that he has been fully pardoned by the President of the United States [and] did take the oath in said proclamation prescribed by the President of the United States … ').

12 *Ibid.*, at 22.

13 See *The Captive*, at 22: 'The taking of above Oath does not operate as a pardon in cases where the person taking it is included in any of the exceptions enumerated in the Presidents amnesty Proclamation. Such persons must receive the special pardon of the President, to facilitate which, the previous recommendation of the Provisional Governor ought generally to be first obtained: the petition for Pardon ought to be accompanied by an original oath, signed by the party or officer administering it. The assumption that the oath of amnesty is a Pardon is a wonderful assumption, since every man could take the oath with or without the pardon — and this assumption is still more wonderful when taken in connection with the fact that the prisoners oath here presented, is a statement, that the original oath ought to accompany the petition for pardon. It is well known that the President refuses to entertain applications for pardon unless the petitioner has taken the amnesty oath and forwards it with his petition. If the prisoner has a pardon from the President, it is insisted that he must produce it.'

commission again rejected Gee's jurisdictional plea, this time without giving any reasons.[14]

Having ruled upon Gee's jurisdictional challenges, the charges and specifications were read out to him. Gee pleaded 'not guilty' to the charges.

3. The Trial

John Milton Brawley, a former officer in the Confederate army, was called as first prosecution witness on the third day of the proceedings. He testified to the terrible human conditions that had prevailed at Salisbury prison during the relevant period.[15] He also confirmed that Major Gee had at all times been the commandant of that prison. Many subsequent prosecution witnesses testified to the same effect. However, none implicated Gee in the direct commission of any of the crimes charged.

The defence case was as simple as the prosecution position had been straightforward: conditions were terrible at the time and prisoners died in numbers, but Major Gee was neither responsible for these conditions nor for the deaths of detainees.[16] Instead, he did all that was in his power to try to improve their lot.[17] Many of the witnesses testified to Gee's good character, to the measures that he took to try to improve the situation and to the effect that the abolition of prisoners' exchange between the conflicting sides had produced a terribly unfortunate effect on the Confederacy's ability to provide decent living quarters for its prisoners.

In the middle of the trial, Gee filed a petition for a writ of *habeas corpus* with the Superior Court of Law and Equity of North Carolina. The petitioner claimed in its application that a Presidential Proclamation dated 2 April 1866 had terminated the armed conflict and had effectively put an end to the application of martial law. As a result, he said, the military commission had lost its jurisdiction over him and was by then acting illegally.[18] A writ was duly issued by

14 *The Captive*, at 22.

15 See e.g., Transcript of proceedings, 23 February 1866, re-printed in *The Captive*, 23 et seq., in particular at 23–24 ('[Examined by the Judge Advocate] Describe the condition of the prison? [Answer of the witness] The place was too small for the amount of men. After the weather set in bad it was very muddy. It looked as they didn't have much clothing. They had some tents, they had holes in the ground, and there was somewhere from eighteen to forty died every day. When they died they were taken to a house called the dead house.')

16 As part of his defence, Gee's counsel also sought to demonstrate that Confederate troops were also subject to food and sanitary hardship during the relevant period (see e.g., *The Captive*, at 25–26).

17 See e.g., *The Captive*, at 37–44, 55, 58 et seq., 65–67, 226–232.

18 Documents pertaining to this application are re-printed in *The Captive*, at 7–9. The part of the President Johnson's Proclamation cited by Gee's counsel read as follows: 'Whereas Standing Armies, Military Occupation, Martial Law, Military Tribunals, and the Suspension of the Writ of Habeas Corpus are in time of Peace dangerous to Public Liberty, incompatible with individual rights of the citizens, contrary to the Equity and Spirit of our free institutions and exhaustive

Judge Fowle to Major General Ruger, who responded that he was acting under the direct authority of the President of the United States and effectively declined to surrender Gee. Shortly thereafter and based upon Ruger's communication, Judge Fowle rescinded the writ. He explained his change of position by asserting that he might have misconstrued the intent of the President's Proclamation and wished to avoid any conflict between the civilian and military authorities.[19] A parallel motion again alleging lack of jurisdiction based on the same presidential proclamation was likewise dismissed without reasons given by the commission.[20]

On 13 June 1866, after 57 days of proceedings, the trial came to a close.[21] In lieu of a final address, the parties submitted the case on the evidence.[22] On that same day, the military commission rendered its verdict, unanimously finding Gee 'not guilty' on the charges. The commission took notice, however, of what it regarded as Gee's weakness and blamed higher Confederate authorities for the crimes committed in Salisbury prison:

> the Commission attaching no responsibility to the said John H. Gee, other than for weakness in retaining position when unable to carry out the dictates of humanity, and believing that higher authorities of the Rebel Government were fully responsible for all the alleged violations of the Laws and Customs of War.[23]

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of the National resources and ought not therefore to be sanctioned or allowed except in cases of actual necessity for repelling invasion or suppressing insurrection or rebellion.'

19 The reasons for that reconsideration of the writ were as follows: 'It may be however that the Court has misconstrued the intent of the President's Proclamation, and that it was not his purpose to suppress the existence of Martial Law, as to Military Commissions, in actual Session for trial at the time the Proclamation was promulgated. The Court being desiring of avoiding all conflict between the Civil Authority of the State and the Military Authority of the U.S. has thought it advisable to defer its future action until it may have an opportunity to preview meaning of the Proclamation in this respect.' (*The Captive*, at 9).

20 See, *The Captive*, at 171–173.

21 Commentators of the time had pointed to the costly nature of these proceedings. See e.g., the somewhat partisan comment in the *Tri-Weekly Florida Sentinel* of 16 June 1866, re-printed in *The Captive*, at 590: 'The Raleigh correspondent of a New York paper says the trial of Major Gee has already cost the Government over one hundred and fifty thousand dollars. And it is asserted by the same correspondent that an iota of proof criminating the prisoner has not been established! Pretty costly effort to prove an innocent man guilty! But that sum bears no proportion whatever to the value which his friends attach to the character of Major Gee!' Much of the cost of Major Gee's defence was born by donations of local citizens (see, *ibid.*, at 590–591).

22 See, *The Captive*, at 568–569 ('[Submissions from defence counsel] we think it would be improper to bring before the Commission an incomplete argument & therefore we say that we will submit the case without argument, if the Judge Advocate will do likewise. We cannot present to this commission a stronger argument of the innocence of the accused than the record of the evidence before you. If that evidence is not an argument, there is no necessity for us to make any. If the Judge Advocate will agree to this proposition we submit the cause of the accused into your hands trusting in God & your Honor th[at] his innocence, which we have shown here – the record, may by you be declared. [The Judge Advocate replying] I shall not ask for further time in the case. The proposition of the Defence is accepted and the case submitted on the evidence.')

23 *The Captive*, at 569.

In approving the proceedings and findings of the commission, Major General Robinson acting as reviewing authority made it clear that he could not agree with the commission's findings. According to Robinson, Major Gee had had within his authority the power to relieve much of the suffering of the prisoners under his charge.[24] 'There seems to have been more anxiety to prevent the escape of prisoners of war', he said, 'than to preserve their lives'.[25] Despite General Robinson's grudging disapproval of the commission's findings, Gee was released and a few weeks later, when his health finally permitted, he returned to a hero's welcome to his hometown in Florida.[26]

4. Conclusion

What is perhaps most admirable about these proceedings is the extraordinary fairness with which they were conducted. Unlike the *Wirz* trial, where the dark hand of politics had played its part in directing the course of proceedings, Gee's trial had seemingly remained free of political interference.[27] Counsel for the accused was permitted to present his case unhindered and to produce the evidence thought relevant to their case, while the Judge Advocate acted with all the necessary diligence and integrity.

How two cases, those of Wirz and Gee, which in factual terms were so similar could have been treated in such different ways and resulted in diametrically opposed findings remains somewhat of a mystery.[28] One explanation pertains to Gee's conduct. While Wirz had been portrayed as an uncaring, violent and authoritarian commander, one who was said to have taken a direct part in the commission of some of the atrocities, Gee came across as a man of good character who did his best under conditions that he had little or no part in creating. The defence of 'a good man in a bad situation' that was advanced by Gee's counsel on his behalf is not unusual in war crimes cases. What is unusual, however, is that in Gee's case it succeeded.[29]

24 *The Captive*, at 571.

25 *Ibid.* The record of the trial was subsequently passed on to the President of the United States, Andrew Johnson by Jonathan Worth, Governor of North Carolina.

26 *The Captive*, at 593.

27 During the *Wirz* proceedings, for instance, then-Secretary of War Stanton had taken a direct part in the (re-)drafting of charges (with a view to having the references to the leadership of the Confederacy removed). When reviewing the findings of the commission, Judge Advocate General Holt and US President Johnson had them likewise expurgated to remove the names of some of the leaders of the Confederacy. See, generally, Laska and Smith, *supra* note 7.

28 The military commission which tried Wirz announced its verdict on 24 October 1865. He was found guilty of war crimes and was executed on 10 November 1865.

29 It is all the more unusual that the circumstances that prevailed at Andersonville prison, which Henry Wirz commanded, had been to a large extent similar to those prevailing at Salisbury prison. Unlike Gee who was acquitted, Wirz, however, was convicted of violations of the laws and customs of war and was sentenced to death. See, above, footnote 7 for references to that case.

A second, perhaps less obvious — and supplementary — explanation for the differences between the two trials has to do with the national background of the accused: Wirz, a Swiss national by birth, was the subject of much attack and vilification in the press not least by reason of his nationality.[30] In contrast, no such national prejudice existed against Gee, a full-blooded American.

A third consideration might have had to do with the change of the political scene at the time of the *Gee* trial, which occurred a few months after the *Wirz* trial. The desire for vengeance and accountability that was still raw immediately after the war and during the *Wirz* proceedings had given way to a more sober political atmosphere turned towards political healing between the two formerly warring communities.

In former Confederate states, however, the acquittal of Gee was at times perceived as more than the acquittal of one man and as the 'vindication of the South'.[31] This form of *collectivization* of war crimes verdicts is a relatively common feature of these types of proceedings. Whether they lead to an acquittal or to a conviction, war crimes proceedings are often perceived by the communities concerned — in particular those to which the accused belongs — as an absolution or, as the case may be, a condemnation, of the group as such. The idea that individual criminal responsibility, as opposed to collective guilt, is capable of putting an end to the idea of group liability is valid only up to a point. Because of their position of authority and of the prestige which they might enjoy in their community, or because they are thought to have been the protector of their 'people' during the conflict, war crimes indictees are often regarded as more than mere individuals. They are often symbols or icons in their respective communities who effectively transcend their own persona and their actions. Their crimes become the crimes of their people while their acquittal becomes a vindication of their community.[32]

30 During the *Wirz* proceedings, *Leslie's Illustrated* commented: 'Thank God, [Wirz] is not of American Origin' (*Leslie's*, 23 September 1865, cited in Rutman, *supra* note 7, at 120). An authority on the *Wirz* trial, Darrett Rutman, has suggested that the 'press barrage' against Wirz caused the Swiss consul-general to refuse to acknowledge that Wirz was of Swiss origin (*ibid.*, at 122, footnote 25).

31 See Editorial of 19 June 1966 from the Semi-Weekly *Floridian*, re-printed in *The Captive*, at 592 ('The announcement which has reached all our readers of the triumphant acquittal of Major John H. Gee, will send a thrill of joy to every Southern heart. For while it does but simple justice to the character of our fellow-citizen, and gives him a prouder record than he had before, it is before the world, a vindication of the South').

32 The author represented Sefer Halilović before the International Criminal Tribunal for the former Yugoslavia. During the Bosnian conflict, General Halilović had been the first Commander of the Army of Bosnia and Herzegovina. In Bosnia, the view was widespread that Halilović had been charged and was being tried, not for his acts, but as a symbol of the people he had defended during the war. When I visited Bosnia after his acquittal, I was greeted and thanked, not just (and perhaps not even primarily) for helping him, but for what many people believed to have been my contribution (and that of his defence team) to the *acquittal* of the Bosnian Army or, in some cases, the validation of the Bosnian people. For many, it was the people of Bosnia and Herzegovina who had fought for a multi-ethnic country; it was they who had been on trial in The Hague. See G. Mettraux, 'Foreword', in S. Halilovic, *Nije Kriv/Not Guilty* (Sarajevo, 2009).

As the commission's legal findings are few and sometimes ambiguous, the jurisprudential legacy of the *Gee* proceedings are hard to fathom. Yet it is in no sense an insignificant one. First, these proceedings provide for a reiteration of the principle already laid down in *Wirz* that an individual could be made accountable for his acts directly as a result of international law. Long before the Nuremberg proceedings, individual criminal responsibility was therefore recognized as forming part of the arsenal of international law. Second, the trial of Major Gee provided, again as *Wirz* had acknowledged a few months earlier, that a violation of the laws and customs of war could constitute a crime and not just an illegal act attributable to a state.[33] Counsel for Gee did not attempt to challenge either of these legal premises and they have been regarded since then as good law.

The case also stands, perhaps more ambiguously though, for a principled stance against the possibility of providing immunity to those who committed war crimes through pardons and paroles. As noted above, the precedent is rather weak on this point, but it does provide some indication, at the very least, that when it comes to pardoning and amnestying crimes, war crimes are crimes of a different type and character from regular, domestic, crimes.

Most important of all is the fact that the trial took place at all and that it was conducted against a former, vanquished, enemy with all the necessary fairness. That a state was willing to put one of its citizens (albeit a former enemy in a civil war, recognized as an international armed conflict[34]) on trial for crimes committed against its own people and interests, and that it managed to set aside old enmities and the bitterness of war to give that man a fair trial, is a symbol of the law's ability to mediate and transcend conflicts and contribute to the process of societal healing between formerly warring communities.

33 In this context, it should be noted that neither the charges, nor the Judge Advocate took a position as to the legal nature of the armed conflict between the Confederate South and the Union. The charges appear to assume, therefore, that the conduct attributed to Gee would have amounted to a war crime regardless of the nature of that conflict. If that position was in fact adopted, the case could represent one of the first acknowledgements of the possibility of committing war crimes in the context of internal armed conflict. See, generally, R. Falk, *The International Law of Civil War* (Baltimore and London: Johns Hopkins Press, 1971), in particular at 61 and 73 (in regard to the findings against Wirz). It should be noted, however, that in *Coleman v. Tennessee* (97 US 509, at 517 (1878)), the United States Supreme Court found that the conflict was *international* in character so that *Gee* might not in fact stand as a precedent for that proposition after all ('The doctrine of international law on the effect of military occupation of enemy's territory upon its former laws is well established. Though the late war was not between independent nations but between different portions of the same nation, yet, having taken the proportions of a territorial war, the insurgents having become formidable enough to be recognized as belligerents, the same doctrine must be held to apply.') (available at http://supreme.justia.com/us/97/509/case.html; visited 6 August 2010).

34 On the recognition of belligerency issued by President Lincoln and the proclamation of neutrality made by Great Britain in 1861, acts that turned the civil war in an international armed conflict, see A. Cassese, *International Law* (2nd edn., Oxford: Oxford University Press, 2005), at 126. See, again, *Coleman v. Tennessee* (97 US 509, at 517 (1878)).